Supreme Court, U. S.
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IN THE

SUPREME COURT OF THE UNITED STATES

1980

No. 79-1783

ALONZA SMITH,

Petitioner

-vs-

STATE OF OHIO

PETITION FOR A WRIT OF
CERTIORARI TO THE SUPREME COURT OF OHIO

ALLEN BROWN
5th. Floor Barrister
216 E. Ninth
Cincinnati, Ohio
45202

HENRY SHELDON
1016 First National Bank Bldg.
Cincinnati, Ohio
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IN THE

SUPREME COURT OF THE UNITED STATES

1980

No. _____

ALONZO SMITH,

Petitioner

v.

STATE OF OHIO

PETITION FOR A WRIT OF CERTIORARI
TO THE SUPREME COURT OF OHIO

The petitioner, Alonzo Smith, prays that a Writ of Certiorari issue to review the judgment of the Supreme Court of Ohio which dismissed the petitioner's appeal sua sponte on February 8, 1980.

OPINIONS BELOW

A copy of the order dismissing, sua sponte, the petitioner's appeal to the Supreme Court of Ohio appears at Appendix A, infra, pp.19. A copy of the memorandum decision and judgment entry of the Court of Appeals, First Appellate District, Hamilton County, Ohio appears at Appendix B, infra, pp. 20 . A copy of the judgment entry of the Court of Common Pleas, Hamilton County, Ohio appears at Appendix C, infra, pp.25.

JURISDICTION

The petitioner is seeking a writ of certiorari to the Supreme Court of Ohio. The Supreme Court of Ohio dismissed the petitioner's appeal sua sponte on February 8, 1980. This petition is being filed pursuant to the provisions of 28 U.S.C.A.§ 125.7 (3). This petition is being filed within the time provisions of U.S. Sup. Ct. Rule 22(1), 28 U.S.C.A..

QUESTION PRESENTED

1. Whether an affidavit in support of a search warrant which fails to state sufficient facts from which the issuing magistrate can determine the credibility of the informant or the reliability of his information, but which merely stated that the affiant officer has determined the reliability of the informant, contravenes constitutional guidelines and whether evidence seized pursuant to a search warrant based upon such an affidavit is seized pursuant to a warrant not based upon probable cause and/or is seized contrary to the proscription against unreasonable searches and seizures set out in the Fourth Amendment to the Constitution of the United States.

2. Where a defendant is in police custody in the living room of an apartment and police officers discover a gun in the bedroom during a search under a search warrant authorizing a search for drugs, and where the drugs which are found necessitate a custodial arrest under state law, whether the seizure of the gun is beyond the scope of the search warrant and contrary to the command of the Fourth Amendment to the Constitution of the United States that search warrants particularly describe the things to be seized.

CONSTITUTIONAL PROVISIONS INVOLVED

Constitution of the United States, Amendment IV:

"The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched and the persons or things to be seized."

STATUTES AND RULES INVOLVED

§ 2925.11, Ohio Revised Code:

(A) No person shall knowingly obtain, possess, or use a controlled substance.

.....

(C) Whoever violates this section is guilty of drug abuse:

(1) If the drug involved is a compound, or mixture, preparation, or substance included in Schedule I or II, with the exception of marijuana, drug abuse is a felony of the fourth degree, and if the offender has previously been convicted of a drug abuse offense, drug abuse is a felony of the third degree.

.....

§ 2923.13, Ohio Revised Code:

(A) Unless relieved from disability as provided in section 2923.14 of the Revised Code, no person shall knowingly acquire, have, carry, or use any firearm or dangerous ordnance, if any of the following apply:

.....

(3) Such person is under indictment for or has been convicted of any offense involving the illegal possession, use, sale, administration, distribution, or trafficking in any drug of abuse, or has been adjudged a juvenile delinquent for commission of any such offense.

.....

(B) Whoever violates this section is guilty of having weapons while under disability, a felony of the fourth degree.

Rule 4(E)(2), Ohio Rules of Criminal Procedure

Arrest without warrant. Where a person is arrested without a warrant the arresting officer shall, except as provided in subdivision (F), bring the arrested person without unnecessary delay before a court having jurisdiction of the offense, and shall file or cause to be filed a complaint describing the offense for which the person was arrested. Thereafter the court shall proceed in accordance with Rule 5.

Rule 41(C), Ohio Rules of Criminal Procedure

Issuance and contents. A warrant shall issue under this rule only on an affidavit or affidavits sworn to before a judge of a court of record and establishing the grounds for issuing the warrant. The affidvait shall name or describe the person to be searched or particularly describe the place to be searched, name or describe the property to be searched for and seized, state substantially the offense in relation thereto, and state the factual basis for the affiant's belief that such property is there located. If the judge is satisfied that probable cause for the search exists, he shall issue a warrant identifying the property and naming or describing the person or place to be searched. The finding of probable cause may be based upon hearsay in whole or in part, provided there is a substantial basis for believing the source of the hearsay to be credible and for believing that there is a factual basis for the information furnished. Before ruling on a request for a warrant, the judge may require the affiant to appear personally, and may examine under oath the affiant and any witness he may produce. Such testimony shall be admissible at a hearing on a motion to suppress if taken down by a court

reporter or recording equipment, transcribed and made part of the affidavit. The warrant shall be directed to a law enforcement officer. It shall command the officer to search, within three days, the person or place named for the property specified. The warrant shall be served in the daytime, unless the issuing court, by appropriate provision in the warrant, and for reasonable cause shown, authorizes its execution at times other than daytime. The warrant shall designate a judge to whom it shall be returned.

STATEMENT OF THE CASE

1. Procedural Posture

The Appellant, Alonzo Smith, was indicted in a two count indictment. Count I of that indictment alleged possession of cocaine in violation of § 2925.11 of the Ohio Revised Code. Count II alleged that the Appellant knowingly had a firearm while under a disability, in violation of § 2923.13 of the Ohio Revised Code.

A Motion to Suppress the evidence which served as the basis of the two counts was filed on November 3, 1978. A hearing on this motion occurred on November 27, 1978, before the Honorable William S. Mathews, Judge of the Hamilton County Court of Common Pleas. After a hearing and argument the Court overruled the Motion to Suppress. (T. p. 41).

The Appellant then proceeded to trial and was found guilty of both counts in the indictment. (T. p. 46). The Appellant was sentenced as appears of record and a Notice of Appeal was timely filed. The Court of Appeals, First Appellate District, affirmed the Appellant's conviction on October 31, 1979.

A Notice of Appeal to the Ohio Supreme

Court was timely filed on November 20, 1979. The Supreme Court of Ohio dismissed that appeal on February 8, 1980.

This petition to seek review of that decision was timely filed.

2. Statement of Facts

On April 11, 1978, Police Officer, Clifford George, a member of the Regional Enforcement Narcotics Unit, applied, by means of an affidavit for a search warrant from the Honorable John Ranz, Judge, Hamilton County Municipal Court. Based upon the affidavit, a search warrant for the premises known as 3115 Durrell, Apartment 13, was issued during the early morning hours of April 11, 1978. (T. p. 7)..

The affidavit was based upon information received from a "confidential and reliable" informant. Based upon such information, the search warrant authorized a search for "marijuana, scales, articles used for packaging and distributing." At the time the warrant was applied for, police officers did not know who was occupying Apartment 13, 3115 Durrell Avenue which allegedly had marijuana on the premises.

Based upon the warrant issued by Judge Ranz, police officers and RENU agents entered Apartment 13 3115 Durrell wherein they found the Appellant, Alonzo Smith.

The first room the officers walked into was the living room. (T. p. 9). This room contained a television and a stereo, but no furniture other than a table. (T. p. 10). Upon entering that room, Mr. Smith was taken into custody (T. ps. 10-11) and held in that room while the search was conducted (T. p. 11). The Appellant was asked to sit down on the floor and a police officer was left with him while the search was conducted. (T. p. 11).

The officers left the Appellant with their brother officer in the living room and proceeded to search in the bedroom (T. p. 11). The first area searched was the closet wherein Agent George found a vial of cocaine (T. p. 14) which served as the basis of Count I in the indictment rendered against the Appellant, Alonzo Smith. Further searching within the bedroom by Agent George and Agent Engelman produced some money, some marijuana, and a .25 calibre pistol (T. p. 13). These items were found in the nightstand (T. p. 14). The gun seized served as the basis for Count II in the indictment rendered against the Appellant, Alonzo Smith.

REASONS FOR GRANTING THE WRIT

A. AN AFFIDAVIT IN SUPPORT OF A SEARCH WARRANT WHICH FAILS TO STATE SUFFICIENT FACTS FROM WHICH THE ISSUING MAGISTRATE CAN DETERMINE THE CREDIBILITY OF THE INFORMANT OR THE RELIABILITY OF HIS INFORMATION, BUT WHICH MERELY STATES THAT THE AFFIANT OFFICER HAS DETERMINED THE RELIABILITY OF THE INFORMANT, IS CONSTITUTIONALLY DEFECTIVE. ANY EVIDENCE SEIZED PURSUANT TO A SEARCH WARRANT ISSUED UPON SUCH AN AFFIDAVIT MUST BE SUPPRESSED.

The affidavit in support of the search warrant for 3115 Durrell, Apartment 13, in its factual recitation, states:

> "The Affiant has received information from a confidential and reliable informant who has given this officer and brother officers of the Regional Enforcement Narcotics Unit information that has been proven reliable through independent investigation by the affiant. This informant has been in the above described premises within the past 72 hours and has observed marijuana. This informant knows marijuana from past use of this drug."

When hearsay information from a "confidential and reliable informant" is used in an affidavit to establish probable cause for the issuance of a warrant, then the two-prong test established in Aguilar v. Texas, 378 U.S. 108 (1964) must be applied. Aguilar stated that the affidavit in support of the search warrant must contain:

(a) Information about the facts upon which the informant based his allegations of criminal activity, and;

(b) Some of the underlying circumstances from which the officer concluded that the informant was credible or his information reliable.

The Appellant's contention both in the trial court and here is that the factual recitation in the affidavit in support of the search warrant for Apartment 13 at 3115 Durrell is insufficient to meet the second prong of the Aguilar test. The Appellant's contention is that the factual recitation fails to reveal underlying circumstances sufficient to conclude that the informant was credible or his information reliable.

Both Aguilar and Spinelli v. United States, 393 U.S. 410 (1969) require that the affidavit set forth sufficient underlying facts and circumstances from which a magistrate may conclude that the source of the hearsay information, the informant, is credible or his information reliable. The affidavit in this case states that the informant has given information "... that has been proven reliable through independent investigation by the affiant." This phrase fails to adequately apprise an issuing magistrate or a reviewing court of any circumstance which would justify a belief in the informant's credibility.

The problem with the affidavit at issue here, as with the affidavit in State v. Gill, 49 Ohio St. 2 177, 360 N.E. 2 693 (1977) is that the alleged "factual" support of the informant's credibility or reliability depends upon the assertions of the police officer affiant. The determination of which facts are sufficient to support the credibility of the informant "through independent investigation" is solely at the whim and caprice of the police officers involved in the case.

There are no facts here presented which allow the magistrate to conclude that the factual verification indeed establishes the reliability or credibility of the informant and hence establish probable cause. The issuing magistrate and this court do not know whether the "independent investigation" by the affiant verified the informant's name or whether it verified essential facts establishing probable cause independent of the allegations in the affidavit. The Appellant contends that independent investigation of insignificant facts, such as the informant's name, even if verified do not establish the credibility of the informant or the reliability of his information. The United States Supreme Court seems to agree with the Appellant. (See Spinelli v. United States, supra, at p. 417).

If the court accepts the affidavit in this case it is abdicating its constitutional function as a neutral determiner of probable cause. The police officer affiant in this case determined which facts were sufficient, when verified, to establish the credibility of the informant or the reliability of his information. This is not the intent and meaning of Aguilar, and it is not a constitutionally acceptable procedure. As was stated in Johnson v. United States, 33 U.S. 10 (1948), in reference to the Fourth Amendment's protection, at p. 14:

"Its protection consists in requiring that those inferences be drawn by a neutral and detached magistrate instead of being judged by the officer engaged in the often competitive enterprise of ferreting out crime."

So that the Appellant's position is made clear, the Appellant is not contending that insignificant details are, per se, an insufficient basis for crediting the tip of an informant. The Appellant is contending that the affidavit in this case sets forth no facts, insignificant or otherwise, from which the issuing magistrate could conclude the credibility of the informant or the reliability of his information. Here, the affiant police officer made that determination. Therefore, the face of the affidavit is insufficient to comply with Aguilar. As a result it was prejudicial error not to suppress the evidence in this cause. (See State v. Graddy, 55 Ohio State 2 132, 378 N.E. 2 472 (1978); State v. Gill, supra; State v. Brehm, 27 Ohio St.2 239, 272 N.E.2 122 (1972); State v. Joseph, 25 Ohio St.2 95, 267 N.E.2 125 (1971)).

B. WHERE A DEFENDANT IS IN POLICE CUSTODY IN THE LIVING ROOM AND POLICE OFFICERS, DISCOVER A GUN IN THE BEDROOM DURING A SEARCH UNDER A SEARCH WARRANT AUTHORIZING A SEARCH FOR DRUGS, AND WHERE DRUGS ARE FOUND WHICH NECESSITATE A CUSTODIAL ARREST, THE SEIZURE OF THE GUN IS BEYOND THE SCOPE OF THE SEARCH WARRANT THEREY MANDATING ITS SUPPRESSION.

Police officers and RENU agents in executing a search warrant at 3115 Durrell, Apartment 13, for marijuana, found a loaded .25 automatic pistol. (T. p. 13). This pistol was seized and the Appellant, Alonzo Smith, was charged with having a weapon while under a disability. Neither the affidavit nor the search warrant contemplated a weapon and the search warrant did not authorize seizure of the weapon.

The Fourth Amendment to the Constitution of the United States provides:

> "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches, and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched and the persons or things to be seized." (Emphasis added).

Similarly, Rule 41(C) of the Ohio Rules of Criminal Procedure, in relevant part, provides:

> "The affidavit shall name or describe the person to be searched or particularly describe the place to be searched, name or describe the property to be searched for and seized, state substantially the offense in relation thereto, and state the factual basis for the affiant's belief that such property is there located. If the judge is satisfied that probable cause for the search exists, he shall issue a warrant identifying the property or place to be searched." (Emphasis added).

The Fourth Amendment to the Constitution of the United States and Rule 41(C), Ohio Rules of Criminal Procedure, require that a search warrant particularly describe property which is to be seized under the warrant. This particularity requirement is designed to prevent a general or exploratory search. This constitutional proscription was explained in Marron v. United States, 275 U.S. 192 (1927), at p. 196 wherein the court states:

"The requirement that warrant shall particularly describe the things to be seized makes general searches under them impossible and prevents the seizure of one thing under a warrant describing another. As to what is to be taken, nothing is left to the discretion of the officer executing the warrant."

However, neither the Fourth Amendment nor Rule 41(C) restrict police officers, in executing a warrant, to the degree that Marron suggests. There is a well recognized exception to the requirement of particularity. This exception, termed the "plain view" doctrine, was explained, and the requirements to its application were delineated, in Coolidge v. New Hampshire, 403 U.S. 443 (1971). Collidge, at page 466, states.

"What the 'plain view' cases have in common is that the police officer in each of them had a prior justification for an intrusion in the course of which he came inadvertently across a piece of evidence incriminating the accused. The doctrine serves to supplement the prior justification whether it be a warrant for another object, hot pursuit, search incident to lawful arrest, or some other legitimate reason for being present unconnected with a search directed against the accused - and permits the warrantless seizure. Of course, the extension of the original justification is legitimate only where it is immediately apparent to the police officer that they have evidence before them; the 'plain view' doctrine may not be used to extend a general exploratory search from one object to another until something incriminating at last emerges."

There is no question in this case that the search warrant did not authorize the seizure of the .25 calibre automatic pistol. Its seizure then would be beyond the scope of the search warrant unless the plain view doctrine was applicable. In order for the plain view doctrine to apply here the three-prong test set forth in Coolidge must be met. Therefore, in order for the seizure of the .25 calibre pistol to be reasonable within the meaning of the Fourth Amendment, the courts must affirmatively find:

(a) The police officers in this case had a prior justification for the intrusion into 3115 Durrell, Apartment 13;

(b) The police officers inadvertently came across the .25 calibre automatic pistol; and

(c) It was immediately apparent to the police officers that the .25 calibre pistol was a piece of evidence incriminating the Appellant, Alonzo Smith.

The thrust of this agrument is directed at (c) as above set forth. It is the contention of the Appellant that a failure to affirmatively find the information set forth in (c) means that the plain view doctrine does not apply in this case. As a result the seizure of the .25 calibre automatic pistol would be beyond the scope of the warrant issued in this case and would be unreasonable within the meaning of the Fourth Amendment to the Constitution of the United States. Therefore, the failure to grant the motion to suppress as to the .25 calibre automatic pistol would be prejudicial error mandating reversal of Count II in this case.

The Police Officers and RENU Agents in this case applied for a search warrant for Apartment 13, 3115 Durrell, at approximately 2:50 a.m. on April 11, 1978, less than one hour before the

warrant was executed. An examination of the affidavit for the search warrant indicates that at the time the warrant was applied for the affiant did not even know the name of the Appellant. The affidavit only describes the Appellant as a "a male negroe." Surely if the Appellant's name was known it would have been included in the affidavit. However, it must be assumed that the Appellant's name was not known, for the face of the affidavit is the only evidence on that issue before the court.

It would be impossible for the police officers in the case to know that the Appellant was under a disability, and therefore in violation of law by possession of the .25 calibre automatic pistol, if they did not know his name at the time the affidavit was presented to Judge Ranz.

The Court below, realizing the difficulty presented by the affidavit, attempted to clear up any question to a reviewing court concerning the amount of information known to the officers at the time of the seizure of the .25 calibre pistol. The court, at T.p. 18, had this exchange with Agent George:

> "The Court: Agent George, when you went to the apartment, did you know Alonzo Smith at that time?
>
> The Witness: Not by sight, but through past investigations that have been going on.
>
> The Court: I mean, when you were admitted, did you know who it was, who was admitting you?
>
> The Witness: By the description, we felt it was him Your Honor.

The Court: Okay, and did he identify himself to you?

The Witness: Yes, sir, he did. We asked who he was, and he said 'Alonzo Smith.'

The Court: Okay, and did you know anything about his background?

The Witness: Yes, sir."

A shorter, similar exchange occurred between the court and Agent Engelman, at T.P 22-23:

"The Court: Thank you, Officer. You knew Mr. Smith, did you?

The Witness: Please sir?

The Court: Did you know Mr. Smith?

The Witness: Yes, sir.

The Court: And were you familiar with his background, were you?

The Witness: Yes sir, I was."

A review of the affidavit and the exchanges between the court and Agents George and Engelman does nothing to clear up the question of whether or not the Agents knew that the Appellant was under a disability at the time the .25 calibre pistol was seized. The law in Ohio and elsewhere makes it quite clear that unless the record affirmatively shows that it was immediately apparent to the officers that they were seizing evidence incriminating the accused the plain view doctrine does not apply.

State v. Williams, 55 Ohio St. 2d 82, 377 N.E.2d 1013 (1978), held a seizure of automobile

parts not to be within the purview of the plain view doctrine, and hence unreasonable, where the record failed to affirmatively establish a sufficient factual basis upon which the police officers could have known that the defendant was in possession of contraband. The law of that case applies to the instant cause. (Accord, Shipman v. State, 291 Ala. 484, 282 S.2d 700 (1973); People v. LaRocco, 178 Colo. 196, 496 P.2d 314 (1972); Cook v. State, 134 G. App. 712, 215 S.E.2d 728 (1975); State v. Keefe, 13 Wash. App. 829, 537 P.2d 795 (1975)).

In addition to Ohio and other state courts, two United States Court of Appeals decisions are directly on point, support the Appellant's position, and mandate a reversal of the trial court's overruling of the Appellant's motion to suppress. They are United States v. Gray, 484 F.2d 352 (6th 1973) and United States v. Clark, 531 F.2d 928 (8th 1976).

The First District Court of Appeals in addressing this issue agreed with the Appellant that the arresting officers did not know, at least on the face of the record, anything about the Appellant's past criminal conviction. The court, however, upheld the seizure of the pistol as being upon "reasonable grounds" and necessary because the Appellant was still in the apartment. The Court then went on to quote Chimel v. California, 395 U.S. 752, 763 (1969), in support of its position. A review of that quote clearly shows that it is not applicable to the factual pattern here presented. That quote from Chimel permits a seizure of a weapon from the area in the immediate control of the arrested. Here, the Appellant was in the custody of a police officer in the living room (T. p. 11), and the gun was found in the bedroom (T. p. 13). Additionally, the cocaine was found before the gun was found. (T. ps. 12, 13). A person found in possession of cocaine

must, under the terms of § 2925.11, Ohio Revised Code, be charged with a felony. Rule 4(E)(2), Ohio Rules of Criminal Procedure, requires that a person committing a felony be taken into custody. Therefore, both factually and according to law, the Appellant did not have the opportunity to gain access to the gun, the reason for the Chimel rule. The reasoning of the Court of Appeals as to the presence of the Appellant fails critical analysis.

The Court of Appeals also argued that there were "reasonable grounds" for the seizure of the pistol. Attention is directed by the court to State v. Fields, 29 Ohio App. 2d 154, 279 N.E.2d 616 (1971). Fields permitted the seizure of a .38 calibre shell casing where the warrant directed a search for a .33 calibre revolver. The connection between a .38 calibre revolver and a .38 calibre shell casing is apparent.

The facts of the Appellant's case are clearly distinguishable.

It is respectfully submitted that the seizure of the .25 calibre automatic pistol was beyond the scope of the warrant issued in this case and hence was unreasonable within the meaning of the Fourth Amendment ot the Constitution of the United States. It was therefore error prejudicial to the Appellant to deny the motion to suppress the .25 calibre automatic pistol. The Appellant's conviction of Count II must be reversed.

CONCLUSION

The decision of the trial court in this cause, affirmed on appeal, demonstrates that the courts in Ohio are allowing the police to use a form affidavit in support of a search warrant. The Ohio Supreme Court consistently permits affidavits which fail to state facts from which an issuing magistrate can determine the existence of probable cause. (See, e.g., State v. Karr, 44 Ohio St.2 163, 339 N.E.2 641 (1975)). This case presents a situation where the police officers determined the reliability of the informant. This is contrary to law.

The decision of the trial court in this cause, affirded on appeal, also demonstrates an apparent exception to the clear constitutional rule requiring specificity as to items being searched for without explaining the constitutional reasoning. The Supreme Court of Ohio has followed the specificity requirement. (See, e.g., State v. Williams, supra). However, even though the facts of this case require application of the constitutional rule, the courts below have failed to do so.

It is respectfully submitted that the writ should be issued.

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SC-10A 79-10-1 BARRETT BROTHERS, PUBLISHERS, SPRINGFIELD, OHIO

THE SUPREME COURT OF OHIO

THE STATE OF OHIO,
City of Columbus.

State of Ohio,

Appellee,

vs.

Alonzo Smith,

Appellant.

*19*80 *TERM*
To wit: February 8, 1980

No. 79-1641

APPEAL FROM THE COURT OF APPEALS

for HAMILTON *County*

This cause, here on appeal as of right from the Court of Appeals for HAMILTON *County, was considered in the manner prescribed by law, and, no motion to dismiss such appeal having been filed, the Court sua sponte dismisses the appeal for the reason that no substantial constitutional question exists herein.*

It is further ordered that a copy of this entry be certified to the Clerk of the Court of Appeals for HAMILTON *County for entry.*

I, Thomas L. Startzman, Clerk of the Supreme Court of Ohio, certify that the foregoing entry was correctly copied from the Journal of this Court.

Witness my hand and the seal of the Court this ..... day of ..... 19.....

.....Clerk

.....Deputy

Defendant was notified of the right to appeal as required by Crim. R. 32 (A) (2).

-356 828

FILED
Court of Appeals
OCT 31 1979
Clerk of Courts

B 781416

IN THE COURT OF APPEALS

FIRST APPELLATE DISTRICT OF OHIO

HAMILTON COUNTY, OHIO

ENTERED
OCT 31 1979
IMAGE 18

STATE OF OHIO, : NO. C-780822

Plaintiff-Appellee, :

vs. : MEMORANDUM DECISION AND JUDGMENT ENTRY.

ALONZO SMITH, :

Defendant-Appellant. :

To the Clerk:
Enter upon the journal of the Court,
per Order of this Court.

By _____
Presiding Judge

Messrs. Simon L. Leis, Jr. and Thomas P. Longano, 420 Hamilton County Court House, Court and Main Streets, Cincinnati, Ohio 45202, for Plaintiff-Appellee,

Mr. Henry E. Sheldon, II, 4545 Carew Tower, Cincinnati, Ohio 45202, for Defendant-Appellant.

PER CURIAM.

This cause came on to be heard upon the appeal, the transcript of the docket, journal entries and original papers from the Court of Common Pleas of Hamilton County, Ohio, the transcript of the proceedings, briefs and oral arguments of counsel.

The single assignment of error having been fully considered it is accordingly passed upon in conformity with App. R. 12(A) as set forth herein.

Defendant-appellant Smith was charged in a two count indictment with possession of cocaine and having a weapon while under disability.

The trial court overruled a motion to suppress evidence. Smith ultimately was found guilty as charged and sentenced to the Ohio Penitentiary. This appeal ensued with the following verbatim assignment of error:

> The trial court substantially erred to the prejudice of appellant in denying the motion to suppress evidence.

The appellant challenges the affidavit which supported the search warrant.[1] In *State v. Karr*, (1975), 44 Ohio St. 2d 163, 339 N.E.2d 641, the Supreme Court had before it the issue of the legal sufficiency of affidavits almost identical to the one *sub judice*. The Supreme Court, in deciding that the affidavits were adequate, held *inter alia*:

> The affidavits in the instant cases, sparse though they may be, satisfy the test in *Aguilar*. No reason appears to read into Crim R. 41(C) a stricter standard, and we cannot say that the magistrates failed to perform their detached and independent function. The preference to be accorded warrants requires that these be upheld. [44 Ohio St. 2d at 167; 339 N.E.2d at 645.]

The appellant contends that *State v. Gill* (1977), 49 Ohio St. 2d 177, 360 N.E.2d 693, supports his assignment of error. The Supreme Court in *Gill* found the factual pattern therein distinguishable from *Karr*, and we find the affidavit before us now distinguishable

---

1. The affidavit states:

> The Affiant has received information from a confidential and reliable informant who has given this officer and brother officers of the Regional Enforcement Narcotics Unit information that has been proven reliable through independent investigation by the affiant. This informant has been in the above described premises within the past 72 hours and has observed marijuana. This informant knows marijuana from past use of this drug.

from the *Gill* affidavit. *Karr* controls here and thus the appellant's challenge to the sufficiency of the affidavit proves meritless.

Armed with a search warrant, the affidavit for which we have validated above, the police searched a closet in the bedroom of Smith's apartment and discovered cocaine.[2] Smith was in his apartment throughout the search. The police proceeded to search in the same room and found a loaded .25 automatic pistol "in the night stand of the bedroom." The pistol was seized and served as a basis for the count of the indictment that Smith had a weapon while under disability, and for the conviction thereon. Appellant claims that the automatic pistol was unlawfully seized and should have been suppressed. The state asserts that the police knew Smith's background and being familiar with it they had probable cause to believe that Smith was under disability, thereby constituting the handgun contraband and within the scope of the search warrant. It is true, as the transcript reveals, that one of the police officers testified as follows in response to the trial judge's inquiry:

> THE COURT: Okay, and did you know anything about his [Smith's] background?
>
> THE WITNESS: Yes, sir.

This colloquy fails to provide adequate proof of the officer's awareness that Smith had been previously convicted of felonies and thus could not legally possess any firearm or dangerous ordnance. The officer's terse reply simply is too unspecific to demonstrate his

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2. The cocaine weighed 0.62 gram.

knowledge of Smith's criminal convictions. We regret that appellee in its approximately one page treatment of this particular issue provides us with little that is helpful, and our independent search, although limited in scope, has developed no controlling authority governing the exact factual situation before us. Entry upon the premises here was authorized and the search (pursuant to a search warrant) which followed was valid. Discovery of the pistol was within reasonable limits of the search. Moreover, we believe the police officers had probable cause to seize it because the facts and circumstances present -- including, of course, discovery of the contraband cocaine -- warranted a prudent man in taking possession of the pistol. It was reasonable for them to believe that Smith's possession of it might have some independent criminal significance or in some reasonable way be directly connected with his illegal possession of cocaine. It may have developed that the weapon would have no criminal significance, but nevertheless reasonable grounds existed for the seizure of it found as it was in the apartment with the cocaine. Moreover, Smith was present during the search and the availability of a loaded weapon to him arguably presented a potentially dangerous situation. Under the circumstances the police may well have been remiss in the performance of their duty had they not taken the pistol.

Although admittedly confronted with a distinguishable factual situation, nevertheless the following language of the U.S. Supreme Court in *Chimel v. California* (1969), 395 U.S. 752 is apt:

> A gun on a table or in a drawer in front of one who is arrested can be as dangerous to the arresting officer as one concealed in the clothing of the person arrested. There is ample justification, therefore, for a search of the arrestee's person and the area "within his immediate control" -- construing that phrase to mean the area from within which he might gain possession of a weapon. . . . . [P. 763]

In *Chimel* the court acknowledged that the recurring questions of the reasonableness of searches depend upon the circumstances and "total atmosphere" of each case. Seizure of the pistol was reasonable in the atmosphere here present.[3]

Resultantly, we find no merit in the assignment and overrule it.

The assignment of error properly before this Court having been ruled upon as heretofore set forth, it is the Order of this Court that the judgment or final order herein appealed from be, and the same hereby is, affirmed.

It is further Ordered that a mandate be sent to the Court of Common Pleas of Hamilton County, Ohio, for execution upon this judgment.

Costs to be taxed in compliance with Rule 24, Appellate Rules.

And the Court being of the opinion that there were reasonable grounds for this appeal, allows no penalty.

It is further Ordered that a certified copy of this Memorandum Decision and Judgment shall constitute the mandate pursuant to App. R. 27.

To all of which the appellant by his counsel, excepts.

KEEFE, P. J., BETTMAN and BLACK, J. J.

ENTERED
OCT 31 1979
IMAGE 22

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3. Compare *State v. Fields* (1971), 29 Ohio App. 2d 154, 279 N.E.2d 616, in which the legality of a seizure of items other than those specifically described in a search warrant is discussed.

ENTERED
NOV 27 1978
IMAGE 21

THE STATE OF OHIO, HAMILTON COUNTY
COURT OF COMMON PLEAS

NO. B781416

THE STATE OF OHIO

-VS-

Alonzo Smith
Defendant

JUDGMENT ENTRY: SENTENCE:
INCARCERATION: OHIO PENITENTIARY
2-10 YEARS ON 1st.COUNT AND 2 to 5 YEARS ON 2nd.COUNT,COSTS TO RUN CONCURRENTLY

Defendant was present in open Court with Counsel Arthur Friedman on the 27th day of November 19 78 for sentence.

The Court informed the defendant that, as the defendant well knew, after trial by the Court, the Defendant had been found guilty of the offense(s) of Drug Abuse, 2925.11 R.C. and Having Weapon under Disability 2923.13 R.C.

The Court afforded defendant's Counsel an opportunity to speak on behalf of defendant. The Court addressed the defendant personally and asked if the defendant wished to make a statement in the defendant's own behalf or present any information in mitigation of punishment.

Defendant is sentenced to be imprisoned in Ohio Penitentiary, for a minimum term of 2 years on 1st. count, 2 years on 2nd.count, and a maximum term of 10 years on 1st. count and 5 years on 2nd.count, and costs.

IT IS THE FURTHER ORDER of this Court, that these sentences are to run concurrently.

CERTIFICATION OF SERVICE

I, Henry E. Sheldon II, attorney for the Petitioner, do hereby certify that I have caused to be delivered by U.S. regular mail a true and exact copy of the foregoing Petition for a Writ of Certiorari to the Appellate Prosecutor's Office, Hamilton County Court House, Cincinnati, Ohio 45202 on this the 6th day of May, 1980.

Henry E. Sheldon II

HENRY E. SHELDON II
Attorney for Petitioner